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IN THE

Supreme Court of the United States

October Term, 1963

No. 956

LYON STEAMSHIP LIMITED,
a foreign corporation,
Petitioner,

v.

JOHN A. SULLIVAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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Petitioner prays for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington rendered in this case on December 30, 1963.

OPINION OF COURT BELOW

The opinion of the Washington Supreme Court is reported in 63 Wash. Dec. (2d) 316-325, 387 P. (2d) 76-82 and 1964 A.M.C. 187-195; and printed in the Appendix hereto.

JURISDICTION

The opinion of the Washington Supreme Court, filed on November 27, 1963, became its final judgment on December 30, 1963 (Tr. 75-76; Appendix 13). This petition is filed within ninety days thereafter.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).[1]

1. A judgment rendered by a department of the Washington Supreme Court is a judgment of the "highest court of a state in which a decision could be had" within the meaning of § 1257, notwithstanding failure to petition for rehearing en banc. *Teamsters' Union v. Lucas Flour Co.* 369 U.S. 95 at 98-101.

QUESTION PRESENTED

The question presented involves the trial court's instruction to the jury on unseaworthiness as tested under this Court's decision in *Mitchell v. Trawler Racer*, 362 U.S. 539.[2] The instruction was as follows:

> "Under the maritime law, a shipowner warrants to its seamen that its vessel, including gangway, is seaworthy. By this is meant that the vessel is properly equipped and maintained, and that the appliances aboard the vessel are reasonably safe for the purposes for which they are designed or intended.
>
> "An owner is not obliged to provide the best possible vessel and gear, and his obligation as to seaworthiness is tested by whether the owner has provided a vessel and gear and crew reasonably safe and suitable for ordinary use. The standard of seaworthiness is not perfection, but reasonable fitness for the service in which the vessel is engaged" (Tr. 18).

QUESTION: Whether, in a personal injury action by a seaman against a shipowner based on separate claims of negligence and unseaworthiness, this instruction can fairly be read as imposing notions of negligence upon the jury's determination of unseaworthiness? In other words, was it necessary or proper to include in this instruction a negative assertion emphasizing that "unseaworthiness is not dependent on fault or want of due care and may exist regardless of the care the owner of a vessel has taken to provide a safe and secure ship"?[3]

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2. In *Mitchell*, this Court reversed a judgment for the shipowner because the trial court mistakenly imported concepts of common law negligence into its instruction on unseaworthiness. The jury was instructed that liability for unseaworthiness could attach only if the alleged unseaworthy condition was "there for a reasonably long period of time so that a shipowner ought to have seen that it was removed." 362 U.S. 539 at 540-541, Note 2.

3. Washington Supreme Court opinion (Appendix 12.)

STATEMENT OF THE CASE

The seaman, in going up the gangway of the shipowner's vessel, broke his right foot, his claim being that when he lost his balance and grasped the hand line, it sagged allowing him to fall upon the dock below.

He contended that the hand line was not reasonably taut or safely adjusted, and that these conditions reflected negligence of the shipowner and/or unseaworthiness of the vessel. The shipowner denied these contentions and affirmatively pleaded contributory negligence.

At the trial, the seaman took exceptions to the instruction on unseaworthiness because it failed to explain negatively that unseaworthiness was wholly unrelated to negligence and was a factual question to be determined regardless of whether the conditions were temporary or longstanding. This instruction was accompanied by a separate instruction on negligence (Tr. 16) and by special interrogatories requiring the jury to find separately whether there was negligence and/or unseaworthiness (Tr. 28).

The jury returned a verdict for the shipowner on both negligence and unseaworthiness; and the trial court, after denying the seaman's motion for a new trial, entered judgment on the verdict. Appealing to the Washington Supreme Court, the seaman assigned errors based on exceptions to the instruction on unseaworthiness, relying on the *Mitchell* case.

In reversing the judgment for the shipowner, the Washington Supreme Court said it was doubtful that the instructions:

". . . pointed out to the jury the fine, but necessarily crucial, distinctions between the claimed negligence and unseaworthiness—the elements of time and notice." (Appendix 6)

and then concluded:

"The learned trial judge came close to making this distinction when he told the jury that a shipowner warrants to seamen that the vessel, including the gangway, is seaworthy, and that such warranty means that the vessel and appliances are reasonably safe for the purposes for which they are designed or intended. *But we think that the trial court should have gone one step further to explain that unseaworthiness is not dependent on fault or want of due care and may exist regardless of the care the owner of a vessel has taken to provide a safe and secure ship.*" (Emphasis added) (Appendix 12)

REASON FOR GRANTING WRIT

The Decision of the Washington Supreme Court Is in Conflict With the *Mitchell* Case, Which Declared an Important Principle of General Maritime Law.

In the *Mitchell* case, this Court held a trial court erred by an instruction which told the jury that unseaworthiness was "quite similar to negligence" and which posed the question:

"Was there something there [a slippery substance on the ship's rail] and was it there for a reasonably long period of time so that a shipowner ought to have seen that it was removed?" 362 U.S. 539, at 540-541, Note 2.

Hence, this Court declared improper an instruction on unseaworthiness which allowed the jury to make a distinction based on the shipowner's opportunity (through

time and notice, to remove a defective condition, thereby enunciating a "complete divorcement of unseaworthiness liability from concepts of negligence." This Court quickly emphasized, however, that "The standard [as to unseaworthiness] is not perfection but reasonable fitness," the sole test being whether a vessel is "reasonably suitable for her intended service." 362 U.S. 539 at 550.

Although the Washington Supreme Court recited in its opinion that this Court had cut a deep distinction between unseaworthiness and negligence, it disregarded the principle of the *Mitchell* case by reversing the trial court upon its instruction as to unseaworthiness because:

> "• • • the trial court should have gone one step further to explain that unseaworthiness is not dependent on fault or want of due care and may exist regardless of the care the owner of a vessel has taken to provide a safe and secure ship." (Appendix 12)

In other words, the Washington Supreme Court misapplied the principle of the *Mitchell* case, which sharply separated the two concepts, when it insisted upon inserting into a simple affirmative explanation of unseaworthiness alone, a confusing negative expression needed only to define negligence. Even worse than mere confusion, the extraneous reference to "want of due care" would tend to turn the jury's thinking toward the possible cause of unseaworthiness and away from the important fact of unseaworthiness.

To summarize, the shipowner submits that clarity between unseaworthiness and negligence coming from the *Mitchell* case is beclouded by the Washington Supreme Court in the present case. Therefore, if the ruling of the